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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LINDA IRENE MEISTER,

Petitioner,

v.

TEXAS ADJUTANT GENERALS DEPARTMENT;
DANIEL JAMES, III, Brigadier General,
in his official capacity as Adjutant General
of the State of Texas

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the status of a plaintiff as a civilian employee of a military department is the determinative factor in considering whether a Title VII claim brought under 42 U.S.C. § 2000e, *et seq.*, is justiciable.

Whether an employer may refuse to comply with applicable law and fail to change its qualifications for a particular position, which consequently prevents the claimant from making a prima facie case in her Title VII claim for failure to promote.

PARTIES TO THE PROCEEDING

Petitioner is Linda Irene Meister. Respondents are the Texas Adjutant General's Department and Brigadier General Daniel James, III.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion (App. A) is reported at *Linda Irene Meister v. Texas Adjutant Generals Department, et al.*, 233 F.3d 332 (5th Cir. 2000). The Magistrate's Report and Recommendation and the district court's opinion approving and adopting the Report and Recommendation (App. B and C, respectively), styled *Linda Irene Meister v. Texas Adjutant Generals Department and Brigadier General Daniel James III* are not reported.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 28, 2000. The Court of Appeals entered an order denying a timely petition for rehearing on January 5, 2001 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the statutory provisions of 42 U.S.C. § 2000e.

Section 2000e-2 (a) states in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

This case involves the statutory provisions of 42 U.S.C. § 2000e-16.

Section 2000e-16 states in pertinent part:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, ... shall be made free from any discrimination based on race, color, religion, sex or national origin.

This case involves Department of Defense Directives.

Department of Defense Directive 140005 C.1. (March 21, 1983) states in pertinent part:

> It is the policy of the Department of Defense to use civilian employees in all positions that do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, or that do not require a military background for successful performance of the duties involved.

Department of Defense Directive 140005, 3.27D (d) (March 21, 1983) provides:

> Positions that have been delineated as military:
>
> (1) Commanders, deputy commanders, commandants and executive officers. . . .

> (2) Positions, which by law, treaty, or regulation require a military incumbent. Examples include Staff Judge Advocate. . . . Positions that are required by law include the following: Chief of Staff . . .
>
> * * *
>
> (4) Positions in which current military expertise is required for successful performance of the prescribed duties . . . Positions may not be delineated as military on the principal basis of duties requiring only knowledge of military administrative procedures or similar capabilities. Such knowledge and capabilities are reasonably attainable by civilian employees.

Department of Defense Directive 140005, 3.27D d (3) (March 21, 1983) provides:

> Conversion to civilian incumbency will be accomplished when qualified civilians become available.

Department of Defense Directives 1100.9 (Sept. 8, 1971) provides:

> Management positions are defined to include the responsible officials, and their principle assistants at the division, branch, section, and comparable level and above, for both operating and staff and service functions.
>
> Support activities . . . are those activities . . . of a commercial-industrial type, such as research and development, procurement, . . . and such administrative and professional activities as

budgeting and accounting, legal, medical, personnel administration and public relations.

* * *

Military personnel normally will be assigned to management positions when required by law, when the position requires skills and knowledge acquired primarily through military training and experience, and when experience in the position is essential to enable the officer personnel to assume responsibilities necessary to maintain combat-related support and proper career development. Civilian personnel normally will be assigned to management positions when the specialist skills required are usually found in the civilian economy and continuity of management and experience is essential and can be provided by civilians. . . . Military and civilian personnel assigned to management positions must be qualified by training and experience for such positions and be expected to perform fully the duties of the positions to which assigned.

Department of Defense Directive 1100.4 (August 20, 1954) provides:

Civilian personnel will be used in positions which do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, which do not require a military background for successful performance of the duties involved, and which do not entail unusual hours not normally associated or compatible with civilian employment.

This case also involves army regulations. Army Regulation AR 570-4, 3.26(b) (September 25, 1989) states in pertinent part:

> Exceptions to civilian incumbency must be held to a minimum. These exceptions must be based on compelling, objective justification that clearly supports a military position identification. When a staff activity requires collective military expertise, a military-civilian team should be established. Duties clearly requiring a military incumbent should be grouped and assigned to a few military positions. The remaining positions should be delineated as civilian.

STATEMENT OF THE CASE

A. Pertinent Facts[1]

Linda Meister was a state civilian employee of the Texas Adjutant General's Department. This department administers the Texas National Guard. Brigadier General Daniel James, III is the head of the department. Ms. Meister was not required to be a member of the Texas National Guard. Nor was she required to be a member of the reserves.

While employed as the Assistant Schools Program Manager/Administrative Technician III supporting the Texas Army National Guard, Ms. Meister was subjected to a hostile work environment by her supervisor because of her gender. Ms. Meister filed a formal complaint and an investigation was undertaken. After the investigation, the department determined that her supervisor had acted improperly.

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1. Pertinent facts are taken from the Record Excerpts filed by Petitioner at the Fifth Circuit Court of Appeals in support of her appellate brief.

Despite that finding, Ms. Meister's supervisor was not transferred to another department until four months after the investigation had been completed. The position of State Schools Program Manager then became available. Ms. Meister sought an opportunity to apply for the position.

The position of State Schools Program Manager is a position that can be classified as a military or civilian position. However, under certain circumstances, it must be classified as a civilian position. If the position is classified as a civilian position, there is no requirement that the individual holding the position also be a member of the military or reserves. Ms. Meister requested that the position be classified as a state civilian position so that she, as a civilian, would be qualified for the position. Ms. Meister subsequently learned that the position had not been reclassified. Six months later, she was involuntarily transferred from her position as the Assistant Schools Program Manager in the Texas Army National Guard Division to Assistant Personnel Manager in the Texas Air National Guard Division.

In February 1998, after suit had been filed, Ms. Meister applied for the position of State Human Resources Manager, Program Administrator IV. There was no requirement that the individual holding this position be a member of the military or reserves. Indeed, the individual that was chosen for this position was not a member of the military or reserves. An objective review of the applications for this position established that Ms. Meister was one of the best-qualified applicants for the position, but she did not receive an interview.

B. Proceedings Below

Petitioner instituted an action seeking compensatory and exemplary damages against the Texas Adjutant General's Department and Brigadier General Daniel James, III (collectively "the employer") for violation of her civil rights under 42 U.S.C. § 2000e. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question). Respondents filed a Motion to Dismiss on the basis that Ms. Meister claims were barred under *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950). Respondents also filed a motion for summary judgment on the merits. The district court granted the Motion to Dismiss in favor of Respondents, finding that Ms. Meister's claims were barred by the *Feres* doctrine.

Petitioner timely appealed this decision. The issues were briefed, and after hearing the argument of counsel, the Fifth Circuit Court of Appeals entered its judgement finding that *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) did not apply to Ms. Meister's claims because she was a civilian employee. (App. A at 13a-14a). The Court also found that Ms. Meister had failed to make a prima facie case with regard to her Title VII claim that the employer retaliated against her in failing to promote her to State Schools Program Manager because she had failed to show that she was qualified for the position, a position that allegedly required active military personnel. (App. A at 15a).

Finally, the Fifth Circuit determined the application of the *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) in the context of two Ninth Circuit cases concerning claims brought by civilians against the military, *Khalsa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985) and *Bledsoe v. Webb* 839 F.2d 1357 (9th Cir. 1988). The Fifth Circuit declined to follow *Bledsoe*, because it construed *Bledsoe* to hold that the status of the plaintiff as a civilian was determinative on whether *Mindes* applied. (App A at 18a). The Fifth Circuit then

remanded this matter to the lower court for a determination as to whether the decisions concerning Ms. Meister's remaining two claims were "internal military decisions" to which *Mindes* would apply. (App A at 20a).

Petitioner filed her petition for rehearing on the issue of the failure to make a prima facie case under Title VII and the Fifth Circuit's construction of, and the failure to apply, *Bledsoe v. Webb* to her remaining claims. The petition for rehearing was denied on January 5, 2001.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Fifth Circuit Court of Appeals conflicts with The Decision of the Ninth Circuit Court of Appeals.

The *Mindes* test was adopted by the Fifth Circuit to determine whether a particular internal military decision should be reviewed. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).[2] However, the threshold question is whether the decision that gave rise to the Title VII claim is an internal military decision. (App. A at 17a).

The Ninth Circuit held that the decision is not an internal military decision subject to *Mindes* if the plaintiff is a civilian employee of the military department. *See Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988). The Fifth Circuit in this matter

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2. Under *Mindes*, internal military decisions should not be reviewed in the absence of: (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations and (b) exhaustion of available intra service corrective measures; 453 F.2d at 201. If these two factors are met, then the court must consider (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved. *Id.*

disagreed, finding that the status of the plaintiff as a civilian was not determinative on whether the decision was an internal military decision. (App. A at 18a). In doing so, it explicitly rejected the Ninth Circuit holding in *Bledsoe v. Webb*. (App. A at 17a-18a).

In *Bledsoe v. Webb*, the plaintiff was a civilian employed by a federal military department. She filed suit under 42 U.S.C. § 2000e-16 when she was refused permission to board a naval ship even though she needed to board to complete her job duties. The district court dismissed her claim, holding that under *Mindes*, her claim was nonjusticiable. Plaintiff appealed, arguing that *Mindes* had been applied only to legal challenges brought by military, not civilian, personnel. In reviewing her claim, the Ninth Circuit held that "a Title VII claim brought by a federal civilian employee of a military department and premised on a denial of embarkation exclusively for gender, is justiciable." 839 F.2d at 1360. In reaching its conclusion, the Court relied on the fact that "plaintiff [Bledsoe] is not a member of the 'military services' " and "no policy or function is implicated which is unmistakably military in nature," *Id.* The Ninth Circuit distinguished *Mindes*, because "*Mindes* . . . did not involve civilian plaintiffs employed by a U.S. military department." *Id.*

In determining the application of *Mindes* to Petitioner's claims in this matter, the Fifth Circuit Court of Appeals refused to follow *Bledsoe* because "[w]hether the plaintiff is civilian or a serviceman does not affect whether the issue we are reviewing qualifies as an 'internal military decision'." (App. A at 18a). The Court concluded "we will not forestall the application of *Mindes* simply because Meister is suing as a civilian." *Id.* Accordingly, the Court rejected *Bledsoe* because it construed *Bledsoe* to find that the status of the plaintiff was the determinative factor in the applicability of *Mindes*.

Under the Fifth Circuit decision, a conflict exists between the circuits as to whether the status of a plaintiff is determinative on whether the *Mindes* test is applicable.

Thus, this Court should grant review to resolve the conflict between the circuits and determine whether the status of a plaintiff (civilian or military) is determinative on whether an employer's decision is an internal military decision subject to the *Mindes* test for reviewability for claims brought under 42 U.S.C. § 2000e and § 2000e-16.

II. Whether an employer may refuse to comply with applicable law and fail to change its qualifications for a particular position, which consequently prevents the claimant from making a prima facie case in her Title VII claim for failure to promote.

In its November 28, 2000 opinion, the Court found that Petitioner failed to make a prime facie case in her claim for failure to promote to the Schools Program Manager position. The Court held that Ms. Meister could not show that she was qualified for the position because she was not active military and the position required active military personnel. *See Haynes v. Pennzoil*, 207 F.3d 296, 300-01 (5th Cir. 2000) (Plaintiff must show he is qualified for the position to which he was not promoted). The Court further held that the employer did not have to alter its required qualification that the individual holding the position be an active member of the military on Ms. Meister's request.

However, Department of Defense Directives (DODD) applicable to the Texas National Guard (administered by the Adjutant General's Department) required that the position be designated as civilian. Thus, the qualifications should have been changed, not because Petitioner requested the change, but because the regulations required the change. If the employer had complied with the applicable regulations, it

would have changed the position from military to civilian and Petitioner would have been able to show that she was qualified for the position of State Schools Program Manager.

The Department of Defense Directives are regulations applicable to the military. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 872, 97 S. Ct. 2150, 53 L. Ed. 48 (1977). These regulations govern how the military is run if they do not contradict the underlying statutory authority. *See, e.g., Greene v. Unites States*, 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed. 2d 576 (1964). Moreover, these regulations must be construed as statutes and the rules of statutory construction apply. 376 U.S. at 160. Thus when a clear policy directive is issued, the regulated agency must comply with that directive.

The Texas National Guard as a military agency, governed by federal law, must comply with these regulations.[3] Thus, the Texas Adjutant General's Department had to comply with the clearly articulated policy of the Department of Defense to assign a civilian to a position unless the position is one that requires military training and expertise. *See* DODD 1100.4 (August 20, 1954).

This policy is unequivocally stated in DODD 140005 (March 21, 1983):

> It is the policy of the Department of Defense to use civilian employees in ***all*** positions that do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, or that do not require a military

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3. *See* appellees' Fifth Circuit Court of Appeals brief at 28. ("Adjutant General is a federal agency as well as state officer, reflecting hybrid state-federal character of the National Guard." (*citing Nesmith v. Fulton*, 615 F.2d 196, 198 (5th Cir. 1980)).

> background for successful performance of the duties involved.

(emphasis added).

An army manpower regulation implements part of the directives by setting forth which positions are military. *See* AR 570-4 (September 25, 1989). This regulation cautions:

> Exceptions to ***civilian*** incumbency must be held to a minimum. These exceptions must be based on compelling, objective justification that clearly supports a military position identification. When a staff activity requires collective military expertise, a military-civilian team should be established. Duties clearly requiring a military incumbent should be grouped and assigned to a few military positions. The remaining positions should be delineated as civilian.

AR570-4, 3.26 (b) (September 25, 1989) (emphasis added). If a qualified civilian is not available, military personnel may be used, but "[c]onversion to civilian incumbency will be accomplished when qualified civilians become available. . . ." DODD 140005, 3.27D d (3). Thus, when a qualified civilian is available, the position **must** be designated as civilian.

Positions that have been delineated as military include positions as commanders,[4] Staff Advocate, Chief of Staff, inspector general, officers, drill sergeants, recruiters and certain positions at the U.S. Military Academy. *See id.* at (d) 1, 2, 3, and 5.

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4. However, the fact that a position requires the supervision of military personnel does not require a military supervisor. *See* AR 570-4, 3.26 c (Sept. 25, 1989).

Another position delineated as military is a position in which current military expertise is required to successfully perform the assigned duties. *Id.* at (d) (4). However, a position cannot be defined as requiring military expertise simply because "of duties requiring . . . a knowledge of military administrative procedures or similar capabilities. Such knowledge and capabilities are reasonably attainable by civilian employees." *Id.* Thus, the fact that a position requires knowledge of military administrative procedures does not justify designating the position as military.

Further, management positions are not reserved for military personnel, especially in support activities such as training. Support activities are defined as activities of "a commercial-industrial type, such as research and development, procurement, . . . and such administrative and professional activities as budgeting and accounting, legal, medical, personnel administration and public relations." DODD 1100.9 (Sept. 8, 1971). The directive limits management positions to military personnel only when "required by law, when the position requires skills and knowledge acquired primarily through military training and experience, and when experience in the position is essential to enable the officer personnel to assume responsibilities necessary to maintain combat-related support and proper career development." *Id.* Otherwise, "[c]ivilian personnel normally will be assigned to management positions when the specialist skills required are usually found in the civilian economy and continuity of management and experience is essential **and can be provided by civilians**." *Id.* (emphasis added).

The State Schools Program Manager is responsible for ensuring training and funds are available for all military occupational skills (MOS) needed within the state. *See RE. 3.* As such this position is a management and administrative position. Indeed, appellees asserted "that the

individual occupying the Schools Manager position would continue to be a person who is on active military status; [] and specifically a Sergeant Major because of the extensive administrative training that SGMs [Sergeant Majors] receive and their experience and knowledge of military education programs." RE 10, p.000736. Respondents emphasized the need for **administrative** knowledge to justify their rationale for keeping the position military. However, A.R. 570.4 3.27 D d (4) explicitly rejects this rationale for keeping a position as military incumbency. Further, Ms. Meister had the experience and knowledge of military education programs having been assistant State Schools Program Managers since May 1993. *See* RE 3. Thus, she was a civilian that could provide the management and experience essential for the position. Accordingly, if the Texas Adjutant General's Department had complied with the DODD 1100.9 (Sept. 8, 1971) and DODD 140005 (March 21, 1983), Ms. Meister as a civilian should have been appointed to the position of State Schools Program Manager.

The applicable law, the foregoing Department of Defense Directives and army regulations, required that the position be converted to a civilian position upon the transfer of SGM. Andrews, especially considering that Ms. Meister was a civilian qualified to perform the duties of the State Schools Program Manager. *See* AR570-4, 3.27Dd(1) and (3) (September 25, 1989), Failure to reclassify the position when it became possible to do so was a violation of the Department of Defense directives and regulations, discussed *supra.* This failure to make the required change effectively deprived Ms. Meister of the opportunity to apply for the position, in retaliation for her complaint of discrimination.

III. The Questions presented are Important.

The questions presented are important. This writ requests the Court to determine if and how Title VII should be applied in cases in which an allegation of discrimination is brought by a civilian employee against his/her military employer.

The outcome of this matter would affect the rights of employees of military departments through out the country. In addition, the outcome would affect the military departments and define and instruct as to the limits of their military discretion.

The outcome would also require a balancing between the interest of the military and the interest of the public in continuing the proper construction and application of 42 U.S.C. § 2000e to military departments, both state and federal.

Considering the widespread effect this decision will have, the Court should grant the writ to resolve the conflict between the United States Circuit Courts of Appeal and to provide a clear precedent on the applicability of Title VII to military departments.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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